Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2003

UNITED STATES OF AMERICA,
Respondent,

vs.

ANTONIO J. PAYTON,
Petitioner.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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40 pp

QUESTIONS PRESENTED FOR REVIEW

The questions presented in this case are:

1. WAS THE INDICTMENT BY WHICH ANTONIO PAYTON WAS CHARGED WITH CONSPIRACY TO DISTRIBUTE CRACK COCAINE SUFFICIENT UNDER THE FIFTH AND SIXTH AMENDMENTS AND THIS COURT'S PRECEDENTS, WHEN IT PROVIDED ONLY A BROAD TIME FRAME AND LOCATION FOR THE ALLEGED CONSPIRACY, AND OTHERWISE FAILED TO PROVIDE ANY STATEMENT OF THE FACTS AND CIRCUMSTANCES COMPRISING THE ALLEGED CRIMINAL AGREEMENT, AND FAILED TO IDENTIFY ANY OF PAYTON'S ALLEGED CO-CONSPIRATORS?

2. IS THE RULE IN SOME CIRCUITS THAT CONSPIRACY INDICTMENTS *NEVER* NEED TO NAME CO-CONSPIRATORS IN ORDER TO SUFFICIENTLY APPRISE DEFENDANTS OF THE NATURE AND CAUSE OF THE ACCUSATIONS AGAINST THEM CONSISTENT WITH THE FIFTH AND SIXTH AMENDMENTS?

3. IS THE RULE IN SOME CIRCUITS THAT CONSPIRACY INDICTMENTS NEED NOT BE AS SPECIFIC AS OTHER, SUBSTANTIVE CRIMINAL INDICTMENTS CONSISTENT WITH THE FIFTH AND SIXTH AMENDMENTS?

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LIST REQUIRED BY RULE 14.1(b) and 29.6

Pursuant to this Court's Rule 14.1(b), the party who sought to have his judgment and conviction reviewed by the United States Court of Appeals for the Seventh Circuit was Antonio J. Payton.

Pursuant to this Court's Rule 29.6, Petitioner Antonio J. Payton hereby certifies that he is an individual.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Antonio J. Payton, a federal prisoner incarcerated for convictions for conspiracy to distribute crack cocaine and other drug-related crimes, respectfully moves this Honorable Court to issue a writ of *certiorari* to review the decision of the United States Court of Appeals for the Seventh Circuit, rendered on May 12, 2003, affirming the conviction.

OPINIONS BELOW

The May 12, 2003 reported decision of the United States Court of Appeals for the Seventh Circuit, 328 F.3d 910 (7th Cir. 2003), appears in Petitioner's Appendix at A-1 through A-4.

STATEMENT OF THE BASIS FOR JURISDICTION

1. The decision of the United States Court of Appeals for the Seventh Circuit sought to be reviewed was rendered on May 12, 2003.

2. Jurisdiction is conferred upon this Court pursuant to Title 18, United States Code, § 3231, and the underlying criminal statutes, Title 18, United States Code, § 924(c), and Title 21, United States Code, §§ 841 and 846.

CONSTITUTIONAL PROVISIONS INVOLVED

This Petition raises issues under the Fifth and Sixth Amendments of the United States Constitution, as set forth in the Appendix at B-1.

STATEMENT OF THE CASE

A. Basis for Federal Court Jurisdiction

The U.S. District Court for the Southern District of Illinois had jurisdiction over this matter pursuant to Title 18, United States Code, § 3231, and the underlying criminal statutes, Title 18, United States Code, § 924(c), and Title 21, United States Code, §§ 841 and 846.

B. Proceedings Below

A judgment of conviction was entered against Antonio Payton on December 4, 2001 by the United States District Court for the Southern District of Illinois, the Honorable J. Phil Gilbert, presiding, after a jury trial held May 7 through May 11, 2001. Payton was convicted of three counts: (1) conspiracy to distribute more than five grams of crack cocaine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B)(iii), and 21 U.S.C. § 846; (2) use of a weapon during the conspiracy in violation of 18

U.S.C. § 924(c); and (3) possession with intent to distribute and distribution of crack cocaine in violation of 21 U.S.C. § 841(a)(1). A01.[1]

On November 29, 2001, Payton was sentenced to 420 months on the conspiracy charge, sixty months on the gun charge (to run consecutively), and 240 months on the possession and distribution charge (to run concurrently). A02. Payton will thus be eligible for parole only in 2034.

Payton filed his timely notice of appeal on December 10, 2001 in the United States Court of Appeals for the Seventh Circuit. Payton raised the following issues in his appeal: (1) whether his crack cocaine conspiracy indictment under 21 U.S.C. § 846 was unconstitutionally vague based on its failure to provide any facts detailing the conspiracy the United States intended to prove at trial; (2) whether there was sufficient evidence to support his conviction for conspiracy; and (3) whether the District Court erred in calculating the amount of cocaine comprising Payton's relevant conduct in determining his sentence.

Oral argument was heard on February 13, 2003. The Seventh Circuit Court of Appeals rendered its decision on May 12, 2003, affirming the District Court's judgment.

With regard to the sufficiency of Payton's indictment, the court rejected Payton's contention that the lack of factual specificity in the conspiracy count rendered the indictment Constitutionally infirm and, specifically, rejected Payton's contention that the indictment should have named his co-conspirators. In doing so, the court relied on a blanket rule in the Seventh Circuit that "an indictment for conspiracy need not name coconspirators."

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[1] References to the Appendix to Payton's Seventh Circuit brief are denoted A01, A02, et seq., while references to the Seventh Circuit Record on Appeal are denoted R.1, R.2, et seq., as permitted by Supreme Court Rule 12(7).

With regard to the sufficiency of the evidence to support Payton's conviction for conspiracy, the court focused on testimony by Payton's father Milton that he had worked as a "runner" for his son's crack operation in Carbondale, Illinois, from November 1996 to April 1999, carrying crack from Payton to his customers. The court held that this testimony alone was sufficient to sustain Payton's conviction. The court also affirmed the District Court's attribution of more than three kilograms of crack cocaine to Payton as relevant conduct connected to the conspiracy for sentencing purposes.

C. Facts Material to the Questions Presented

The Investigation

The United States' investigation of Antonio Payton for drug-related crimes consisted of a series of controlled buys in which confidential sources were given money, fitted with a transmitter, and sent out to contact and make purchases from Payton or others. Two of these incidents provide the basic signposts marking the boundaries of the conspiracy case against Payton.

The first occurred on November 19, 1996. Reporter's Transcript of Proceedings ("RT") II:185-87.[2] The confidential source for the controlled buy was Milton Payton, Antonio Payton's father. RT II:291-93. Wearing a transmitter, Milton Payton came to a house on 609 North Allen in Carbondale, Illinois, where Antonio Payton answered the door and sold him crack cocaine. *Id.* Antonio Payton was not prosecuted for this sale, because he was underage, but the other residents of the house – Cameron Richardson, Collin Noble, Lukyan Traylor,

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[2] The five volumes of trial transcripts representing the five days of trial from May 7 through May 11, 2001, will be designated here by Roman numerals.

Keith Smith, and Musenda Traylor – were all arrested in January of 1997 and were incarcerated thereafter. RT I:16-17.

The second occurred thirty months later on April 29, 1999. On this occasion, a confidential source named Demetrius Johnson, wearing a transmitter, contacted Milton Payton, who again contacted his son, who sold Johnson $200 in crack via his father, in a transaction monitored by law enforcement officials. RT I:27-28.

The Indictments

On May 5, 1999, Payton was indicted on one count for selling crack cocaine related to the April 29, 1999 controlled buy under 21 U.S.C. § 841(a)(1). R. 2. Antonio Payton was arrested on July 25, 1999 and arraigned the following day. R. 3. The initial indictment was superseded by a new indictment on October 7, 1999 which alleged three counts: (1) conspiracy to distribute crack cocaine under 21 U.S.C. § 846, with named co-conspirator and co-defendant Shurron Sherrill, along with others "known and unknown;" (2) the original possession charge related to the April 29, 1999 controlled buy; and (3) a charge for selling a stolen firearm under 18 U.S.C. §§ 922(j) and 924(a)(2). A14-A15. This indictment was, in turn, superseded by two subsequent indictments on February 9, 2000 (correcting Sherrill's middle initial) and August 11, 2000 (adding the amount – five grams or more – to the conspiracy charge). R. 42; R. 75.

On October 5, 2000, Shurron Sherrill pled guilty to the charge against him. R. 84-87. Thereafter, on March 23, 2001, the United States filed a fourth superseding indictment. A16-A17. This indictment changed the weapons charge against Antonio Payton to a charge of using a weapon during the course of the conspiracy under 18 U.S.C. § 924(c). *Id.* It stated the same conspiracy charge against him, but now dropped Sherrill as a co-conspirator and co-defendant:

Count 1

From in or about 1996, to in or about July, 1999, in Jackson County, within the Southern District of Illinois,

ANTONIO J. PAYTON, JR.,

defendant herein, did knowingly and intentionally conspire and agree with other persons known and unknown to the Grand Jury, to knowingly and intentionally distribute and possess with intent to distribute 5 grams or more of a mixture and substance containing cocaine base, "crack cocaine," a Schedule II, Narcotic Controlled Substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(B)(iii); all in violation of Title 21, United States Code, Section 846.

A16.

The Defendant's Motions

Antonio Payton filed a motion for a bill of particulars on May 31, 2000, asking that the United States provide the "identities of the participants" in the conspiracy. R. 62: 2. The United States did not respond, but the Court denied the motion on June 8, 2000, stating (a) that bills of particulars may not be used to discover the identity of unindicted co-conspirators; and (b) that the United States' "open file" policy made a bill of particulars unnecessary. A08-A09.

On May 7, 2001, Payton filed a motion in limine, seeking to exclude evidence of, among other things, "testimony of ... drug sales which are not part of the conspiracy charged" and "testimony of other conspiracies to distribute controlled substances other than the conspiracy charged." R. 131:1. The

Court denied the motion without explanation on the first morning of trial. A13.

The Definition of the Conspiracy in the United States' Opening Statement

The United States' opening statement at trial defined the scope of the single conspiracy charged against Antonio Payton broadly, stating that it had lasted from "at least" 1996 through his arrest in July of 1999, and involved "various types of persons." A36. Included among these "types" were "persons who actually supplied the defendant with crack cocaine." *Id.* Within this category, the United States identified only a "person by the name of Jay," who allegedly served as a supplier to both Payton and his erstwhile co-defendant, Shurron Sherrill. *Id.* "Jay" was identified at trial as Albert Jackson. RT III:131.

Another "type" included "people that the defendant was involved in [sic], his associates... many of [whom] have already pled guilty to their offenses... [who] are going to testify about their involvement in crack cocaine [and] are going to talk about their involvement with the defendant, and they are going to talk about the defendant's involvement with crack cocaine." A37. Here, the United States did not identify any individual "associates" by name. A37-A38.

Finally, the United States stated that the jury would hear testimony from "those unfortunate persons who were users of crack cocaine" sold by the defendant. A38. In this category, the United States identified two individuals, Wendell Wooley, and Anthony Barnett, who had purchased crack from Payton for themselves and others. A39.

The Evidence at Trial

The United States' case against Antonio Payton for conspiracy consisted largely of a series of inmates seeking

reductions to their own sentences for drug-related crimes in exchange for testimony against Payton.

For instance, the only individual ever named in any indictment as a co-conspirator with Antonio Payton was Shurron Sherrill, whose name was dropped from the fourth superseding indictment under which Payton was tried. R. 117. At trial, Shurron Sherrill testified against Payton under the terms of his plea agreement with the United States, seeking a reduction in his own sentence for conspiracy to distribute cocaine. RT II:128-30.

On cross-examination, however, Sherrill testified that he had no agreement to distribute cocaine with Antonio Payton. RT II:144. Sherrill also denied that "Jay" had "fronted" crack cocaine to him and Payton, and denied that he and Payton ever shared crack profits. RT II:148-49.

Sherrill's testimony denying an agreement with Payton was supported by the testimony of Arnold Haskins, who testified that Payton and Sherrill ran "separate operations" in which "everybody kept their own money." RT III:447. And another witness, Kevin Crockett, testified that Payton had told him about an incident in which Sherrill had stolen $1,100 from the glove compartment of Payton's car. RT IV:618-19. Both Haskins and Crockett, like Sherrill, testified pursuant to plea agreements. RT III:438-39; IV:617.

Other government witnesses also denied being part of an agreement to distribute crack cocaine involving Payton. Donathan Brown denied having any agreement with Payton involving selling drugs, testified that they did not buy from the same supplier, and denied ever sharing profits with Payton. RT II:174. Cedric Neal testified that he had no knowledge of Payton's involvement in drug distribution. RT II:250-51. Eldridge Hardley testified that he and Payton were competitors, and that he did not want Payton around when he was selling drugs and that he did not know what Payton was doing. RT

III:428. "We didn't sell dope together." *Id.* Brown, Neal and Hardley, again, all testified pursuant to plea agreements. RT II: 154, 249; III:410-11.

Still other government witnesses described isolated purchases or sales of crack cocaine involving Payton. Freddie Payne testified that he had purchased crack from Antonio Payton on only 2 or 3 occasions in February or March 1998, and denied having any agreement with Payton or with anyone else involving Payton to buy or sell crack cocaine. RT II:119, 127. Greg Harris testified that he sold Payton crack cocaine *once* in May of 1997, but Payton did not pay him. RT III:434-35. Harris admitted that he too had no agreement with anyone in Carbondale to market cocaine, much less Payton, stating that he "sold crack by myself then." RT III:437-38. Michael Palmer testified that he had sold Antonio Payton crack in 1997 and 1998. RT III:463. Palmer testified that he was unaware of any agreement between Sherrill and Payton. RT III:466. Robin Jones testified that he bought crack cocaine from Payton three to four times because his main source was unavailable. RT III:481-82. Justin Green testified regarding two purchases of crack cocaine by Antonio Payton from an individual named Tommy Martinez, for whom Green drove. RT III:491. Lavell Johnson testified that he purchased crack cocaine two times from Payton in June or July of 1998. RT III:500-501. James Rayford testified only that he had purchased crack from Payton "a number of times." RT III:473. All of these government witnesses testified pursuant to plea agreements seeking reduced sentences. RT II:116-17; III:432, 459-61, 469, 479, 489, 499.

The United States also put on evidence of "users" who also did "running" for Payton. Wendell Wooley testified that he had done some "running" for Payton, which he defined as "picking [crack] up, bringing it back to people," over a period of three or four months in 1998. RT I:56. Anthony Barnett testified that he had purchased crack from Payton "several times" in an alley on Oak Street in Carbondale, Illinois. RT IV:540. Like Wooley, he too would direct customers to Payton

on occasion in exchange for a twenty-dollar rock and/or buy for others from Payton. RT IV:541, 545. Neither Wooley nor Barnett testified as to any connection between Payton and Sherrill. RT I:57; IV:541, 545.

Milton Payton, the defendant's father, also testified to having been a "runner" to "help other people get crack cocaine" from his son. RT II:291. He testified to only two specific occasions when he had provided this service to get crack cocaine from his son. The first occurred when he was a confidential source for the United States for its November 9, 1996 controlled buy. RT II: 292-97. In the second, Milton Payton helped Demetrius Johnson on April 29, 1999 purchase crack cocaine from his son; this was the second controlled buy cited above. Milton Payton, however, was not paid for this "service." RT II:297-301.

Finally, the United States' case, at least as described in its opening statement, hinged largely on an alleged conspiracy between Payton, Sherrill and a Jay, in which Jay would sell Payton and Sherrill crack. A36; RT II:133-34; RT III:454. Sherrill and another witness, Orlando Clark, testified that Jay would sell crack to Sherrill and Payton on credit, *i.e.*, "front" them cocaine. RT II:133-34; RT III:454. But, as shown above, Sherrill directly contradicted this testimony on cross examination, stating that Jay did not have a stake in the sales of Sherrill or Payton, and that once they bought from him, it was a "done deal." RT II:148-49. Moreover, both Sherrill and Arnold Haskins testified that Jay cut off Payton and Sherrill when they didn't promptly pay him. RT II:134; RT III:442. And Haskins added his recollection that Jay had stopped dealing with Payton because Payton was "working with the police." RT III:442.

In addition to the alleged Sherrill-Payton-Jay conspiracy, the United States also presented evidence of at least two other possible conspiracies.

First, the United States presented evidence regarding a crack house in which Antonio Payton lived when he was seventeen at 609 North Allen in Carbondale. RT I:16; RT II:183-84; RT III:400. At that time, according to FBI agent Dueker, Payton was "working with Lukyan Traylor, Musenda Traylor, Collin Noble, Cameron Richardson and Keith Smith." RT I:16. The Traylors, Noble, Richardson, and Smith, were all arrested in January of 1997, and incarcerated thereafter, and it was only months later that Payton began associating with Sherrill. RT III:415-16; RT III:501 The United States admits that Payton left Carbondale after the arrests of the 609 North Allen group and moved to Georgia, where he worked for six months, through August of 1997. R. 160.

Second, the United States attempted to introduce an alleged connection between Payton and James Williams, described as the "governor" of the Black Gangster Disciples in the Carbondale area, but the District Court sustained an objection to this evidence by Payton's trial counsel. RT IV:609-610.

The Definition of the Conspiracy in the United States' Closing Statement

In its closing argument, the United States' definition of the conspiracy "proved" veered from the conspiracy it had defined in its opening statement between Payton, Sherrill, and Jay:

- The United States alleged an agreement between Orlando Clark and Payton that they wouldn't sell crack on each other's blocks. A42.

- The United States alleged that James Rayford, Eldridge Hardley, Robin Jones and Freddie Payne would "redistribute" Payton's crack after purchasing it. A44.

- The United States alleged that Payton had agreements with various runners, including Milton Payton, Antonio Barnett, and Wendell Wooley. *Id.*

- The United States alleged an agreement between the occupants of 609 North Allen in 1996. A45.

- The United States argued that Milton Payton provided a constant in the conspiracy from November 19, 1996 through April 29, 1999, even though Milton Payton had been a confidential source/informant on November 19, 1996. A49.

Thus, the United States argued repeatedly, "there are agreements all over the place." A43-A45.

The United States defined the "common objective" of these multiple agreements involving all of these people as "the defendant, Antonio Payton, Jr.'s, desire to be a big-time crack dealer." A40, A44. "Everything the defendant did in this case was trying to increase as a crack dealer, trying to make the most money and maximize his profits.... It's all about maximizing his profits." A46. "That's why we are here. In 1996 the defendant wanted money. In 1999 the defendant wanted money." A40. The United States continued:

> All of the defendant's actions in this case are about selfishness and greed. He never stops selling and it's all about maximizing his profits. The object of the conspiracy was the defendant wanted to be a big-time crack dealer to get what he wanted, the car with the nice rims, the nice clothes. He chose crack cocaine as his way of doing it. From 1996 through July of 1999, the objective never changed.... Throughout it all,

> the only way the defendant could obtain his objective was always having a source and always having a customer.

A48.

REASONS FOR GRANTING THE WRIT

The issues raised by this Petition are compelling questions of Constitutional law concerning the nature of one of the most important safeguards afforded a criminal defendant under the Fifth and Sixth Amendments – the right to have a grand jury define the nature of the charges against him sufficiently so that he can prepare a defense. These safeguards are even more important in the context of conspiracy, a crime Justice Jackson, more than fifty years ago, described as an "elastic, sprawling and pervasive offense" that illustrated the famous maxim that a principle tends to expand "to the limit of its logic." *See Krulewitch v. United States,* 336 U.S. 440, 445 (1949) (Jackson, J., concurring).

Specifically, Payton asks the Court to consider just how "barren" an indictment for conspiracy can be and still pass Constitutional muster. Issue I challenges as insufficient the indictment under which Payton was tried because it failed to provide any information that would permit Payton to identify the specific agreement constituting the conspiracy. The trial that resulted from this bare-bones indictment – where even the prosecutor's peroration concluded that there are "agreements all over the place" – permitted the United States to throw everything it had at Payton in the hopes that something would stick. What resulted was not due process, but guilt-by-association and trial-by-innuendo. The Courts of Appeal appear to offer several different approaches to the question of the sufficiency of a conspiracy indictment, and it is appropriate for this Court to provide clearer guidance.

The second and third issues raised by Payton challenge hard-and-fast rules developed in the Seventh Circuit and repeated in other Circuits to the effect that conspiracy indictments *never* need to name any coconspirators to be sufficient under the Fifth and Sixth Amendments; and, more generally, that conspiracy indictments need not be as specific as indictments charging other offenses. Such hard-and-fast rules are particularly ill-suited to conspiracy cases, where defendants need more, not fewer protections to guard against what Learned Hand called the "darling of the modern prosecutor's nursery." *Harrison v. United States,* 7 F.2d 259, 263 (2d Cir. 1925). This Court should clarify that the Constitutional standards for indictments defined in the Fifth and Sixth Amendments require case-by-case analysis, and that this analysis is no less stringent for conspiracy indictments.

Finally, this Court has never examined the Constitutional requirements of indictments in the context of conspiracies to distribute crack cocaine under 21 U.S.C. § 846, the prosecution of which has exploded over the past twenty years. In this context, where drugs and violence conspire with hopelessness and poverty, permitting "fill in the gaps" prosecutions based on cryptic indictments calls into question the fundamental fairness of the criminal justice system.

ARGUMENT I

THE INDICTMENT BY WHICH PAYTON WAS CHARGED WITH CONSPIRACY WAS INSUFFICIENT UNDER THE FIFTH AND SIXTH AMENDMENTS, WHEN IT PROVIDED ONLY A BROAD TIME FRAME AND LOCATION FOR THE ALLEGED CONSPIRACY, AND OTHERWISE FAILED TO PROVIDE ANY STATEMENT OF THE SPECIFIC FACTS AND CIRCUMSTANCES COMPRISING THE ALLEGED CRIMINAL AGREEMENT.

The Fifth Amendment provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. amend. V. The Sixth Amendment requires that a person charged with a crime be "informed of the nature and cause of the accusation." U.S. Const. amend. VI. The purpose of having a grand jury return an indictment as a prerequisite to criminal prosecution is "to limit [a defendant's] jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." *See Stirone v. United States*, 361 U.S. 212, 217-218 (1960). Thus, "a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." *Id.*

To be sufficient under the Fifth and Sixth Amendments, the Court held in *Hamling v. United States*, 418 U.S. 87, 117 (1974), an indictment must (a) contain the elements of the offense charged, (b) fairly inform a defendant of the charge against which he must defend, and (c) enable the defendant to plead an acquittal or conviction in bar of future prosecutions for the same offense. While *Hamling* noted that "generally it is sufficient that an indictment set forth the offense in the words of the statute itself," the Court went on to hold that such a general description must be "accompanied with such a statement of the

facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged." *Id.* at 117-18, *citing United States v. Hess,* 124 U.S. 483, 487 (1888).

Practical application of the *Hamling* test in conspiracy cases produces a disorienting divergence among the Circuits, however. On the one hand, there are cases where indictments similar to the one upon which Payton was convicted, containing contain no more than the barest outlines of the charge, have been sustained. *See, e.g., United States v. Giles,*756 F.2d 1085, 2086 (5th Cir. 1985); *United States v. Dunn,* 841 F.2d 1026 (10th Cir. 1988).

By contrast, other circuits have rejected similar indictments. In *United States v. Cecil,* 608 F.2d 1294 , 1296-97 (9th Cir. 1979), for instance, the court rejected a "barren" indictment where it only named some of the defendant's alleged coconspirators and gave an indefinite time frame and geographical location of the conspiracy. The *Cecil* court noted that the "glaring lack of factual particularity" in the indictment "would deprive a defendant of a basic protection that the grand jury was designed to secure, because a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury that indicted him." *Id.* The indictment in *Cecil* was *more* specific than the indictment in the present case against Payton, because it did, at least, identify some coconspirators.

And, some circuits have even rejected indictments that contain *far more* information than the indictment at issue here. *See, e.g., United States v. Barnes,* 158 F.3d 662, 664 (2d Cir. 1998)(thirty-three count indictment that included extensive detail about history of Latin Kings street gang, detailed 15 specific racketeering acts, and named 33 coconspirators, but containing no specificity as to the role that the defendant played in carrying out conspiracy's objectives was "insufficient on its face").

In this light, the level of factual specificity in indictments considered in the past by this Court is perhaps instructive. In *Burroughs v. United States*, 290 U.S. 534, 543 (1934), a conspiracy indictment was held sufficient where the count

> charges with particularity that the petitioner Burroughs was the treasurer of a designated political committee from July 22, 1928, to and including March 16, 1929, which committee during that period accepted contributions and made expenditures for the purpose of influencing and attempting to influence the election of presidential and vice presidential electors in two states. The amounts of certain contributions made for the committee are set forth, together with the dates when made and the name of the contributor.

Similarly, in *United States v. Miller*, 471 U.S. 130, 135 (1985), the Court held that an indictment that had "fully and clearly set forth a number of ways in which the acts alleged constituted violations," including seven paragraphs describing the facts of the fraudulent scheme alleged, satisfied the "notice-related concerns" underlying the requirement of an indictment. Again, both *Burroughs* and, more recently, *Miller*, involve indictments that contain significantly more information than the indictment against Payton.

Miller's discussion of the "notice-related concerns" underlying the law of indictments relies on *Russell v. United States*, 369 U.S. 749 (1962), which is the Court's most thorough discussion of the requirements of an indictment, and the rationale therefor. In *Russell*, the issue was whether an indictment for failure to answer questions of a congressional subcommittee regarding Communist infiltration into the news media (focusing on the *New York Times* circa 1954) had to identify the subject of inquiry of the subcommittee to be

sufficient. 369 U.S. at 764. The Court held that an indictment that stated the dates of the hearings, cited the statute violated, and listed the specific questions the witnesses had refused to answer nevertheless was insufficient as a matter of law because it failed to identify specifically the subject of the subcommittee's inquiry. *Id.*

The Court's language in so holding was expansive:

> It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species, – it must descend to particulars. An indictment not framed to apprise the defendant with reasonable certainty, of the nature of the accusation against him is defective…

369 U.S. at 765 (internal quotations omitted) (citations omitted). The Court called these "basic principles of fundamental fairness." *Id.* at 766.

More pointedly, the Court stated,

> A cryptic form of indictment in cases of this kind requires the defendant to go to trial with the chief issue undefined. It enables his conviction to rest on one point and the affirmance of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture.

Id. at 766. The Court described this "fill in the gaps" prosecution of one of the defendants in *Russell* as follows:

> At every stage in the ensuing criminal proceeding Price was met with a different theory, or by no theory at all, as to what the topic had been. Far from informing Price of the nature of the accusation against him, the indictment instead left the prosecution free to roam at large – to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal.

Id. at 768.

The Constitutional concerns of *Russell* are nowhere to be found in Payton's prosecution. Payton's "cryptic" indictment clearly did not "descend to particulars." Instead, the only "facts" it alleged are an extremely broad and ill-defined time frame of the alleged conspiracy ("From in or about 1996, to in or about July, 1999") and its general location ("Jackson County, within the Southern District of Illinois"). But it did not allege the names of *any* individuals with whom Antonio Payton allegedly conspired. Instead, it merely stated that Payton had conspired with others "known and unknown" to the Grand Jury. Nor did it provide any other information that would permit Payton to identify the unlawful agreement that necessarily provided the basis for the grand jury's theory of criminality.

How was Payton adequately apprised by this indictment of the nature of the charges against him so that he could prepare his defense, as required by the second prong of the *Hamling* test? The evidence presented at trial by the United States shows how impossible his task would have been. The United States presented evidence from a parade of incarcerated former drug dealers or drug users, most seeking reductions in their sentences. There was evidence of him buying drugs from various individuals and selling drugs to various individuals. There were insinuations of gang connections. This evidence, the United States argued after the fact, showed "agreements all

over the place." But which was the agreement for which Payton was indicted? The indictment itself gives no clue.

Payton's indictment thus let him go to trial with the "chief issue undefined" –the agreement that formed the basis of the conspiracy. As in *Russell,* at every stage of the proceedings, Payton was met with a different theory – "agreements all over the place" – or no theory at all, as the prosecution "roamed at large." And, in the end, the United States was able to "shift its theory of criminality" in its Closing Statement to "fill in the gaps of proof" by arguing that Payton's father Milton was the link connecting the three-year conspiracy alleged in the indictment; and by arguing that Payton himself was the hub of a huge web of conspirators, all of whom oddly had as their goal Payton's own dream of becoming "a big-time crack dealer to get what he wanted, the car with the nice rims, the nice clothes." A48.

In *United States v. Piccolo,* 723 F.2d 1234, 1239 (6th Cir. 1983), the court held that an indictment that "particularly described the unlawful agreement which formed the theory of criminality" advanced by the government at trial, was "Constitutionally sound." Here, the vague indictment against Payton that permitted the United States to change its theory of criminality *in its Closing Statement* was not sound. The result was clearly prejudicial to Payton, because he can have no assurance that he was tried and convicted on the charge brought by the grand jury.

ARGUMENT II

A HARD-AND-FAST RULE THAT CONSPIRACY INDICTMENTS *NEVER* NEED TO NAME CO-CONSPIRATORS IS INCONSISTENT WITH THE FIFTH AND SIXTH AMENDMENTS.

The Seventh Circuit's opinion in this case pronounces a hard-and-fast rule that an indictment for conspiracy need never name coconspirators, citing a series of cases in the Circuit to that effect, though without examination. *See, e.g., United States v. Penny,* 60 F.3d 1257, 1262 (1995)("no other coconspirators need be identified in an indictment"); *United States v. Kramer*, 711 F.2d 789, 796 ("There is, however, no requirement that a conspiracy indictment identify uncharged co-conspirators."). Other circuits have case that make similar blanket pronouncements. *See, e.g., United States v. Gaytan*, 74 F.3d 545, 552 (5th Cir. 1996)("defendants cite no cases requiring that the indictment name unindicted coconspirators").

Meanwhile, other circuits have adopted and explained a case-by-case approach toward the sufficiency of indictments:

> [W]hat is a fair description of a crime for purpose of permitting an adequate defense necessarily varies with the nature of the offense and the peculiarities of defending against the kind of charge involved.... [A]rbitrary rules as to the necessity, in the abstract, of a given averment have no place in the analysis, as the question is whether the indictment as a whole conveys sufficient information to properly identify the conduct relied upon by the grand jury in preferring the charge.

United States v. Tomasetta. 429 F.2d 978, 979 (1st Cir. 1970). *Id.* Thus, in *United States v. Hallock,* 941 F.2d 36, 40-41 (1st

Cir. 1991), the court held, following *Tomasetta*, that an indictment for conspiracy to distribute cocaine that listed the defendant's four principal coconspirators was valid because "it contained enough information to inform Hallock of the criminal conduct in which he was alleged to have engaged."

And, though not announcing a requirement that it be so, many other cases have held indictments to be sufficient where part of the information they contain is, in fact, the identities of coconspirators. *See, e.g.*, *United States v. Nelson-Rodriguez*, 319 F.3d 12 (1st Cir. 2003); *United States v. Cole*, 755 F.2d 748 (11th Cir. 1985).

The requirements of the Fifth and Sixth Amendment with regard to indictments, as explored in *Hamling* and *Russell,* are that an indictment provide a statement of the facts and circumstances surrounding a charged offense sufficient to enable the defendant to defend against it. There is no ontological basis for distinguishing between types of information – the names of coconspirators, for instance, versus the boundary dates of the conspiracy. Since the gravamen of conspiracy is an agreement, the identities of coconspirators may, in some circumstances, be necessary to provide definition to the conspiracy alleged. Conversely, it follows that, in some circumstances, the absence of the identities of coconspirators from an indictment may render it Constitutionally suspect.

Here, the dates of the conspiracy the United States alleged were the span of Payton's entire adult life; the location of the conspiracy, the only place he had ever lived. The total content of the indictment against him, in terms of real information, was thus that, at some point in his life, he had conspired with someone to distribute crack cocaine. The *only* information that could have provided Payton with an understanding of the specific conspiracy charge against him would have been the identities of who he was alleged to have conspired with. The Seventh Circuit's hard-and-fast rule that the identities of coconspirators need never be revealed in a

conspiracy indictment yields, in this case, under these circumstances, an indictment and a trial where Payton was never informed of the nature and cause of the accusation against him.

ARGUMENT III

A HARD-AND-FAST RULE THAT CONSPIRACY INDICTMENTS NEED NOT BE AS SPECIFIC AS AN INDICTMENT FOR A SUBSTANTIVE OFFENSE IS INCONSISTENT WITH THE FIFTH AND SIXTH AMENDMENTS.

Some of this Court's decisions dating from before *Russell* and *Hamling* appear to stand for the proposition that a conspiracy indictment need not have the same level of factual specificity required by indictments for other offenses. *See, e.g., Glasser v. United States*, 315 U.S. 60, 66 (1942)("particularity of time, place, circumstances, causes, etc., in stating the manner and means of effecting the object of a conspiracy for which petitioners contend is not essential to an indictment"). The case most cited by various circuits to this effect is *Wong Tai v. United States,* 273 U.S. 77, 81 (1927). In *Wong Tai*, the Court stated that "in an indictment for conspiring to commit an offense – in which the conspiracy is the gist of the crime – it is not necessary to allege with technical precision all the elements essential to the commission of the offense which is the object of the conspiracy."

Several circuits, including the Seventh Circuit in which Payton was convicted, have extrapolated a hard-and-fast rule from *Wong Tai* that conspiracy indictments may be held to a lower standard of specificity than other indictments. *See, e.g., United States v. Roman*, 728 F.2d 846, 852 (7th Cir. 1984)("a conspiracy indictment need not be as detailed and specific as an indictment alleging a substantive offense"); *see also, United States v. Ivey,* 949 F.2d 759, 765 (5th Cir. 1991); *United States*

v. Starr, 584 F.2d 235 (8th Cir. 1978); *United States v. Ramos*, 666 F.2d 469, 475 (11th Cir. 1982).

Other circuits have rejected this approach. *See, e.g., United States v. Yefsky*, 994 F.2d 885, 593 (1st Cir. 1993)(where conspiracy depends on specific identification of facts of underlying mail fraud, indictment that fails to specify false pretenses used was defective notwithstanding *Wong Tai*); *United States v. Hooker*, 841 F.2d 1225, 1229-30 (4th Cir. 1988) ("*Wong Tai* contains no language which would impart validity to an indictment which omits an allegation of an element of the crime charged nor does it suggests at any time in the opinion that a mere citation of the statute under which the indictment issues will satisfy the requirement").

Wong Tai itself, however, does not support a rule excusing a lack of factual specificity in conspiracy indictments. In *Wong Tai*, the indictment was held to be Constitutionally sufficient because it "charged the defendant, with definiteness and certainty and reasonable particularity as to time and place, with *conspiring with a named person* and others to commit certain specified offenses in violation of the Opium Act; *and further charged him, in like manner with doing various specific acts to effect the object of the conspiracy*." 273 U.S. at 81 (emphasis added). The indictment had, in fact, set forth the name of the defendant's coconspirator, Ben Drew, and identified specific shipments of opium by date, the name of the ship on which they arrived, and the number of sacks or tins of opium smuggled. *Id.* at 79-80.

There is no principled basis why a conspiracy indictment should be subject to less-exacting scrutiny than an indictment for any other crime. Indeed, this Court's cases suggest that a higher level of scrutiny may be warranted in conspiracy cases. In *Direct Sales Co., Inc. v. United States*, 319 U.S. 703, 711 (1943), for instance, the Court noted that "charges of conspiracy are not to be made out by piling inference upon inference." Similarly, in *Kotteakkos v. United*

States, 328 U.S. 750, 776 (1946), the Court noted that, as a conspiracy "is broadened to include more and more, in varying degrees of attachment to the confederation, the possibilities for miscarriage of justice to particular individuals becomes greater and greater.... At the outskirts they are perhaps higher than any other form of criminal trial our system affords." Thus, the Court noted "extraordinary precaution is required." *Id.*; *see also, Dennis v. United States,* 384 U.S. 855, 860 (1966)(conspiracy indictments "must be scrutinized carefully as to each of the charged defendants because of the possibility, inherent in a criminal conspiracy charge, that its wide net may ensnare the innocent as well as the culpable").

The Court's most expansive discussion of the peculiar nature of conspiracy prosecutions is found in *Krulewitch v. United States,* 336 U.S. 440, 446 (1949), where Justice Jackson in concurring noted that "[t]he modern crime of conspiracy is so vague that is almost defies definition." This "looseness and pliability of the doctrine," he wrote, "present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of a particular case." *Id.* at 449. Among these dangers are the likelihood that a defendant will be confronted at trial with a "hodgepodge of acts and statements by others" to prove the conspiracy that are admissible "only upon assumption that conspiracy existed." *Id.* at 453. This threat is magnified because "[c]onspiracy in federal law aggravates the degree of crime over that of unconcerted offending." *Id.* at 449. Thus, Justice Jackson concluded, "there should be no straining to uphold any conspiracy conviction where prosecution for the substantive offense is adequate and the purpose served by adding the conspiracy charge seems chiefly to get procedural advantages to ease the way to conviction." *Id.* at 457.[3] .

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[3] *See also,* Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law § 6.4(b), at 526 (2d ed. 1986) ("[I]t is clear that a conspiracy charge gives the

Krulewitch was, of course, decided long before crack cocaine. In the current climate, conspiracy charges under 21 U.S.C. § 846 are often used by federal prosecutors to ratchet up penalties against defendants in drug cases. But, correspondingly, there is a danger of "dumbing down" standards of proof in drug cases, exemplified by the United States' comments in its closing argument at Payton's trial, responding to his argument that the Government had not shown the existence of the unlawful agreement alleged: "these are crack dealers. Where did you think they are going to go to get these partnership agreements signed and drawn up?" *See* Voir Dire of the Jury, Opening Statements and Closing Arguments, Report of Trial Proceedings at 114.

The Fifth and Sixth Amendments' requirements for criminal indictments are not different in conspiracy cases and they are not different in conspiracy cases involving crack cocaine. The Constitution still requires that an indictment provide the defendant with sufficient particulars about the crime alleged so as to permit him to mount an effective defense. Antonio Payton represents hundreds, if not thousands, of young men who are "in the system," faced with charges of conspiracy to distribute drugs. The laws permit the United States to put these young men away in prison for decades, and often for life, upon conviction for conspiracy under 18 U.S.C. § 846. These conspiracy convictions must be the result of fair trials resting on fair indictments and on evidence that hangs together in a coherent theory.

Payton submits that a cryptic indictment, followed by a scattershot trial alleging "agreements all over the place," followed by a summation by the United States presenting a crazy-quilt theory of the case in which everyone Payton ever

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prosecution certain unique advantages and that one who must defend against such a charge bears a particularly heavy burden.").

knew was part of his conspiracy to become a "big-time crack dealer," just does not provide the requisite confidence that justice is being served.

CONCLUSION

WHEREFORE, based upon all of the foregoing reasons, Petitioner respectfully petitions this Court to grant *certiorari* review.

Respectfully submitted,

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APPENDIX

United States v. Payton, 328 F.3d 910
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Constitutional Provisions Involved B-1

APPENDIX A

UNITED STATES COURT OF APPEALS,
SEVENTH CIRCUIT

UNITED STATES,

Plaintiff-Appellee,

v. No. 01-4245

Antonio J. PAYTON, Jr.,

Defendant-Appellant.

[May 12, 2003]

Before COFFEEY, MANION and ROVNER, Circuit Judges.

ILANA DIAMOND ROVNER, Circuit Judge.

A jury found Antonio Payton, Jr. guilty of conspiring to distribute more than five grams of crack cocaine in Jackson County, Illinois, between 1996 and 1999. In this appeal Payton challenges the sufficiency of the description of the conspiracy in the indictment, the evidence of his guilt, and the district court's findings concerning the amount of drugs for which he was responsible.

Payton first asserts, although acknowledging a long line of contrary precedent, that the indictment in his case was insufficient because it failed to identify his coconspirators. Payton contends that our precedents are confusing, but we think both the rule and the reason for it are clear: the government need not prove with whom a defendant conspired, only that he joined the agreement. See, e.g., *United States v. Testa, 33 F.3d*

747, 750 (7th Cir.1994); *United States v. Maholias*, 985 F.2d 869, 874 (7th Cir.1993).

Because it is the grand jury's statement of the existence of the conspiracy agreement rather than the identity of the parties to the agreement that puts the defendant on notice of the charge he must be prepared to meet, an indictment need not name coconspirators. *United States v. Townsend*, 924 F.2d 1385, 1389-90 (7th Cir.1991). See also *United States v. Penny*, 60 F.3d 1257, 1262 (7th Cir.1995); *United States v. Lopez*, 6 F.3d 1281, 1288 (7th Cir.1993); *United States v. Lechuga*, 994 F.2d 346, 350 (7th Cir.1993); *United States v. Kramer*, 711 F.2d 789, 796 (7th Cir.1983). We decline Payton's invitation to reexamine these cases.

Payton's second challenge--to the sufficiency of the evidence against him--can be rejected based on the trial testimony of a single witness: Payton's father Milton. Milton testified that he worked as a "runner" for his son's crack operation in Carbondale, Illinois, from November 1996 to April 1999, carrying crack from Payton to his customers. This testimony alone is sufficient evidence of a distribution conspiracy. See, e.g., *United States v. Adkins*, 274 F.3d 444, 450-51 (7th Cir. 2001) (sufficient evidence of conspiracy where seller's agent worked as his "go-between," passing drugs to street-level dealers), cert. denied, --- U.S. ----, 123 S.Ct. 150, 154 L.Ed.2d 155 (Oct. 7, 2002); *United States v. Jackson*, 213 F.3d 1269, 1298- 99 (10th Cir. 2000) (sufficient evidence of conspiracy between seller and assistant who worked as runner, middleman, and guard); *United States v. Herrera*, 54 F.3d 348 (7th Cir.1995) (sufficient evidence of conspiracy between broker and buyers where broker arranged single drug purchase); *United States v. Lampkins*, 47 F.3d 175, 179 (7th Cir.1995) (sufficient evidence of conspiracy where runner discussed drug deals and exchanged drugs and cash); *Lechuga*, 994 F.2d at 350

(conspiracy between seller and one who acts as "go- between, facilitator, sales agent, and general helper"). There was other evidence as well, including testimony from people who bought drugs directly from Payton, but this does not mean (as Payton suggests) that the evidence against him was limited to "unconnected buyer-seller transactions." Such transactions involve only the two-person criminal agreement necessary for the separate crime of distribution and thus are not punishable as conspiracies. See *United States v. Shi*, 317 F.3d 715, 718 (7th Cir. 2003); *United States v. Torres-Ramirez*, 213 F.3d 978, 981 (7th Cir. 2000); *United States v. Clay*, 37 F.3d 338, 341 (7th Cir.1994); *Townsend*, 924 F.2d at 1394. But when the buyer or the seller is assisted by a third person, that collaboration is punishable as a conspiracy. The "buyer-seller" argument is irrelevant in such cases because the conspirators are on the same side of the sale. See *United States v. Garcia*, 89 F.3d 362, 365 (7th Cir. 1996); *United States v. Larkins*, 83 F.3d 162, 167 (7th Cir. 1996); *Herrera*, 54 F.3d at 353-54; *United States v. Baskin-Bey*, 45 F.3d 200, 205 (7th Cir.1995). The evidence showing that Payton and his father worked together puts his case in this category. Compare *Adkins*, 274 F.3d at 451 (conspiracy between seller and go-between who passed drugs to street-level dealers); *Garcia*, 89 F.3d at 365 (conspiracy between buyer and agent); *Larkins*, 83 F.3d 162 (conspiracy between buyer and assistant); *Herrera*, 54 F.3d at 353- 54 (conspiracy between defendants on "buying side" of sale); *Lampkins*, 47 F.3d at 179 (conspiracy between sellers and runner); and *Baskin-Bey*, 45 F.3d at 205 (conspiracy between two buyers), with *United States v. Thomas*, 284 F.3d 746 (7th Cir. 2002) (no conspiracy between broker and buyers where broker "presumably earned his commission" from seller); *United States v. Rivera*, 273 F.3d 751 (7th Cir. 2001) (no conspiracy between middlemen and seller where middlemen were paid by buyer); and *United States v. Contreras*, 249 F.3d 595 (7th Cir.) (no conspiracy between middleman and seller

where middleman assisted buyer), cert. denied, 534 U.S. 914, 122 S.Ct. 258, 151 L.Ed.2d 188 (Oct. 1, 2001).

Payton's final argument--that the district court attributed more than three kilograms of crack to him as relevant conduct without explaining how the drugs were connected to the conspiracy--is difficult to understand. In fact, the court found these drugs were part of the conspiracy for which Payton was convicted, and the basis for the finding is clear: the court found, based on a statement by another of Payton's drug runners, Wendell Wooley, that Payton possessed brick-size quantities of crack on at least five occasions between 1996 and 1998. A former FBI agent who testified at Payton's sentencing hearing explained that each brick would weigh conservatively one kilogram. This finding is sufficiently specific, and Payton offers no argument that it is clearly erroneous.

The district court's judgment is AFFIRMED. The government's motion to strike Payton's brief is DENIED.

U.S. v. Payton, 328 F.3d 910 (7th Cir. (Ill.) 2003).

APPENDIX B

CONSTITUTIONAL PROVISIONS INVOLVED

FIFTH AMENDMENT: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.